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**IN THE SUPREME COURT  
STATE OF ARIZONA**

PETITION TO AMEND COMMENT 4  
TO ETHICAL RULE 1.15, RULE  
42, RULES OF THE ARIZONA  
SUPREME COURT.

Petition No. \_\_\_\_\_

In accordance with Arizona Supreme Court Rule 28, Petitioners respectfully ask the Court to amend Comment No. 4 to Ethical Rule 1.15 (“Safeguarding Property”) of Rule 42, Arizona Rules of the Supreme Court.

The proposed amendment asks the Court to adopt a reasonable mechanism for shifting the burden to third parties to take appropriate action to protect their actual or alleged claims to property in a lawyer’s possession.

The amendment will only apply when there is a dispute between a client and third party over the third party's interest in property in the lawyer's possession. That will prevent a third party from using the ethical rules to transform the client's lawyer into the third party's de facto collection agency.

Under the current version of the Rule and Comments, the burden appears to be on the lawyer to file "an action" when a third party asserts a claim against a client's property. Such a burden, without an alternative mechanism such as the one proposed in this Petition, unfairly interposes a third-party's interests into an otherwise conflict-free attorney-client relationship. That burden disrupts the attorney-client relationship. It also leaves the client with no alternative but to succumb to unreasonable demands or face expensive and time-consuming litigation.

The proposed change merely seeks to restore the attorney-client balance, so that people hiring lawyers will not be worse off than persons without a lawyer. In redline format, the attached Exhibit 1 reflects the proposed changes to Comment No. 4.

### **Discussion**

The current version of ER 1.15(e) states:

When in the course of representation a lawyer possesses property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly

distribute all portions of the property as to which the interests are not in dispute.

Comment No. 4 to ER 1.15 [Effective December 1, 2004] states:

The Rule also recognizes that third parties may have just claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim has become a matured legal or equitable claim, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

The last sentence in Comment No. 4, which itself was subject to amendment a few years ago, creates the impression (rightly or wrongly) that the burden is on a client's lawyer to file "an action" in the event of a dispute with a third party. Unless a lawyer is willing to unilaterally determine that a dispute lacks "substantial grounds," something that is both inherently treacherous and inconsistent with the warning against unilaterally "arbitrating" a dispute, a lawyer faced with such a dilemma has no good options. Unfortunately, this vexing dilemma is increasingly common and troublesome.

By imposing such a burden on a client's lawyer without any other reasonable option, the Rule allows third parties to shanghai the services of the

client's lawyer by simply interposing a claim (real, imagined, or somewhere in-between) that requires compromise or litigation. More pointedly, it encourages third parties to make such claims, even when they know they lack merit, to extract some nuisance value out of a client faced with the only other choice: expensive, risky, and time consuming litigation. It also puts the client in a worse position for having hired a lawyer. After all, but for the ethical rule, the client would otherwise have unfettered access to the subject property.

The proposed change is both elegant and evenhanded. It simply allows, in those limited circumstances where there is a dispute between a client and third party, for the lawyer to give reasonable written notice to the third party that, to protect its alleged interest, the third party must take some action. That is, the proposal merely shifts the burden in those cases to the third-party claimant, where the burden traditionally belongs in the first place. The proposal otherwise leaves the Rule and its comments undisturbed. The lawyer and client may still file an action if they prefer. Of course, the proposal has no bearing on any legal duty the lawyer or client may have to the third party.

### **Conclusion**

Petitioners respectfully ask the Court to amend Comment No. 4 to Ethical Rule 1.15 ("Safeguarding Property") of Rule 42, Arizona Rules of the Supreme Court. After the amendment, the burden can return where it should

have always been—on the third party claiming an interest in client property in the lawyer’s possession. A redline version of Comment 4 reflecting the proposed changes is attached as Exhibit 1.

**DATED** this 19th day of July, 2011.

**LEVENBAUM & COHEN**

/s/ Geoffrey M. Trachtenberg, Esq.  
Geoffrey M. Trachtenberg  
Co-Petitioner

**KNAPP & ROBERTS, P.C.**

/s/ David L. Abney, Esq.  
David L. Abney  
Co-Petitioner

**Certificate of Service**

On the above date, counsel electronically filed the original of this document in Word and pdf formats with the Clerk of the Court, Arizona Supreme Court.

## Exhibit 1

### Proposed Amendment to Comment 4 to Ethical Rule 1.15 (“Safeguarding Property”) of Rule 42, Arizona Rules of the Supreme Court

(Additions are shown underlined and deletions are shown ~~stricken~~.)

The Rule also recognizes that third parties may have just claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim has become a matured legal or equitable claim, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute. Alternatively, where there is a dispute between the client and a third party claiming an interest to property in the lawyer's possession that would otherwise belong to the client, the lawyer's ethical duties under Rule 1.15(e) shall be satisfied if the lawyer provides thirty calendar days written notice to the third-party by certified mail to either file an action to protect the alleged claim or the property subject to the dispute will be released to the client.